Southern Newspapers, Inc., d/b/a The Baytown Sun *and* Houston Typographical Union No. 87, affiliated with International Typographical Union, AFL-CIO. Case 23-CA-7788

March 20, 1981

DECISION AND ORDER

On July 7, 1980, Administrative Law Judge Russell L. Stevens issued the attached Decision in this proceeding. Thereafter, all parties filed exceptions and supporting briefs.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Southern Newspapers, Inc., d/b/a The Baytown Sun, Baytown, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraphs 2(b) and (c) and reletter the subsequent paragraphs accordingly.

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT violate Section 8(a)(1) of the National Labor Relations Act by threatening an employee and the Union that, if they filed charges with the National Labor Relations Board or any court, and received any award, the amount thereof would be deducted from any outstanding wage proposal from Respondent.

WE WILL NOT violate Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union concerning the change of shift hours of employees. The appropriate unit involved herein is:

All employees of Respondent at its Baytown, Texas facility, who are engaged in the printing process from the markup or preparation of copy, until the material is ready for the camera room, excluding all other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

WE WILL, upon request, bargain with the Union as the exclusive representative of all employees in the appropriate unit described above, relative to the shift changes of employees.

SOUTHERN NEWSPAPERS, INC., D/B/A
THE BAYTOWN SUN

DECISION

STATEMENT OF THE CASE

RUSSELL L. STEVENS, Administrative Law Judge: This case was heard in Houston, Texas, on April 24, 1980.[1] The complaint, issued February 8, 1980, is based on a

[1] All dates hereinafter are within 1979, unless stated to be otherwise.

[1] In adopting the findings and conclusions of the Administrative Law Judge we find it unnecessary to consider the Administrative Law Judge's discussion of the presence or absence of impasse at various times during the period involved herein and do not adopt such findings. Furthermore, while the record does not support the Administrative Law Judge's finding that Union Representative Sherri Moore was present during the July 1979 negotiations, this error has no bearing on the outcome of this case.

Despite Respondent's exceptions, we find that the post-December 11, 1979, refusal-to-bargain violation, although not specifically alleged, was fully litigated at the hearing. Although Respondent asserts that it had no notice of the specific basis for the violation found, its arguments before us are limited to the law, the sufficiency of the facts, and the interpretation of facts now in the record. Respondent does not allege that it was precluded from adducing any exculpatory facts; nor does it argue that it would have altered its conduct of its case at the hearing in any particular, had it but received what it would deem notice.

The refusal-to-bargain violation found by the Administrative Law Judge, though not the exact one alleged, is related to allegations in the complaint which do assert that Respondent committed that category of unfair labor practice. The issue was fully and fairly litigated and Respondent has not been prejudiced. Due process requires no more. See, e.g., *Alexander Dawson, Inc., d/b/a Alexander's Restaurant and Lounge* v. *N.L.R.B.*, 586 F.2d 1300, 1304 (9th Cir. 1978); *Crown Zellerbach Corporation*, 225 NLRB 911 (1976), and cases cited therein at 912.

[2] We find inappropriate the make-whole order recommended by the Administrative Law Judge since no unlawful unilateral changes within the 10(b) period were found. Accordingly, we will delete that portion of the remedy.

The Charging Party's request for attorney's fees, litigation expenses, and negotiating expenses is denied as we do not find Respondent's defenses herein to be frivolous. *Amsterdam Printing and Litho Corp.*, 223 NLRB 370 (1976); *Heck's Inc.*, 215 NLRB 765 (1974).

Respondent filed a motion to dismiss the complaint. The General Counsel and the Charging Party filed oppositions to the motion. The motion is hereby denied as lacking in merit.

charge filed January 22, 1980, by Houston Typographical Union No. 87, affiliated with International Typographical Union, AFL-CIO (the Union). The complaint alleges that Southern Newspapers, Inc., d/b/a The Baytown Sun (Respondent), violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (the Act).

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.[2]

Upon the record of the case,[3] and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. BUSINESS OF RESPONDENT

Respondent is, and at all times material herein has been, a corporation duly organized under, and existing by virtue of, the laws of the State of Texas. At all times material herein, Respondent has maintained its principal office and place of business at Baytown, Texas, where it is engaged in the business of publishing a daily newspaper. During the past 12 months, a representative period, Respondent, in the course and conduct of its business operations, at its Baytown, Texas, place of business, held membership in or subscription to various interstate news services, including, but not limited to, Associated Press and the United Press; published nationally syndicated features; and had gross annual revenues from such publishing operations in excess of $200,000.

Respondent admits, and I find, that Respondent is, and at all times material herein has been, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that Houston Typographical Union No. 87, affiliated with International Typographical Union, AFL-CIO, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*[4]

Respondent publishes a newspaper in Baytown, Texas, where it presently employs eight persons. At times relevant herein, the number of employees has remained at approximately eight.

Respondent and the Union have been parties to successive collective-bargaining agreements for the past approximately 35 years. The most recent agreement was effective June 1, 1975, to May 31, 1978. Negotiations for a renewal agreement commenced April 11, 1978, but agreement has not been reached, although the parties have met and negotiated at approximately 25 to 30 sessions. The principal issue involved herein arises from the application of section 12 of the expired 1975-78 agreement. That section states:

DAY—NIGHT—LOBSTER SHIFT

> Sec. 12: A day beginning and ending between the hours of 7 a.m. and 6 p.m. shall be paid the day rate. A day beginning or ending between 6 p.m. and 7 a.m. shall be paid the night rate. Shifts beginning after 8:30 p.m. and before 6:00 a.m. shall be considered the lobster shifts and paid for at the lobster rate.

Section 12 was discussed at several of the bargaining sessions, as more fully explained *infra*, but no agreement was reached. The parties had different views concerning the wording of a new section 12.

On May 2, 1979, a fire virtually destroyed Respondent's Baytown plant. Prior to that date employees worked two shifts, one from 7 a.m. to 3 p.m., and one from 8 a.m. to 4 p.m. Respondent's operation was moved on May 3 to another newspaper's plant in Galveston, Texas, approximately 40 miles from Baytown, and remained there until June 18, when it was moved back to Baytown in temporary quarters. The operation was moved back into its permanent quarters in January 1980. During the period May 3 to June 18, Respondent's employees commuted to Galveston to work. The temporary move of the operation to Galveston was not discussed in advance with the Union, nor was the move ever the subject of negotiations. The move itself is not in dispute.

When the move was made to Galveston, the foreman, John Hallman, instructed the employees that they would work from 6 a.m. to 2 p.m., rather than the shift times they had at Baytown. The change of worktime was necessary because the owner of the Galveston plant needed the plant starting at 2 p.m., for publication of its own newspaper. The change of worktime was not discussed in advance with the Union. Employees were paid for the 6 a.m. to 2 p.m. shift, at the regular day rate they previ-

[2] On June 2, 1980, Respondent filed a brief in reply to the General Counsel's brief, and by document dated June 5, 1980, the General Counsel filed an opposition to Respondent's reply brief, asking that it be stricken. That request is granted, and Respondent's reply brief is stricken on the ground that the National Labor Relations Board Rules and Regulations do not provide for reply briefs. It is noted that the reply brief is unnecessary, since it raises the same issue treated, among others, in Respondent's original brief.

[3] By letter dated May 14, 1980, Respondent's counsel forwarded to me a copy of the Union's proposal of May 9, 1980, presented to Respondent after the hearing herein, and requested that the record be reopened to admit the proposal into the record. Respondent contends that the charge in this case was filed in order to enhance the Union's strength at the bargaining table, and that the Union's proposal supports that contention. By document dated May 30, 1980, counsel for the General Counsel opposed Respondent's request.

Respondent's request is denied, on the ground that the proffered evidence was prepared after hearing, and is irrelevant to any charge herein. As noted in the aforesaid letter of May 14, Respondent argues in its brief that the charge in this case was filed with the Board's encouragement, as a coercive device. That allegation was not proved at hearing and is not supported by the proffered evidence.

[4] The background summary is based on credited testimony and evidence that is not in dispute.

ously had been paid for working the shifts from 7 a.m. to 3 p.m., and 8 a.m. to 4 p.m.

When the operation was moved back to Baytown on June 18, the employees were retained on the same shift schedule; i.e., from 6 a.m. to 2 p.m. On June 30 Carol Smith, who had replaced Hallman as supervisor, placed two employees on a 7 a.m. to 3 p.m. shift. The employees were notified of the change by a notice posted on the bulletin board, in accordance with past practice relating to shift changes. Approximately September 15 or 18, two more employees were put on the 7 a.m. to 3 p.m. shift, by a notice to that effect posted on the bulletin board. The remaining four employees continued to work on the 6 a.m. to 2 p.m. shift until December 14, when they were notified by bulletin board notice that they were changed to the 7 a.m. to 3 p.m. shift. All employees worked from 6 a.m. to 2 p.m. each Saturday, at all times relevant herein. During all the time employees worked from 6 a.m. to 2 p.m. they were paid at the day rate. None was paid at the night rate.[5] None of the shift changes of employees ever was discussed with the Union, or with the employees.

B. *Issues*

The principal issue is the Union's contention that Respondent changed employees' working conditions by having them work night-shift hours at day-shift rates, unilaterally in the absence of an impasse in negotiations.

A second issue results from Respondent's denial, in its answer, that the appropriate unit is all employees of Respondent at its Baytown, Texas, facility, who are engaged in the printing process from the markup or preparation of copy until the material is ready for the camera room, excluding all other employees. Subsidiary to this issue is Respondent's denial in its answer that the Union is, and at all times relevant herein has been, the bargaining representative of employees in the aforesaid unit.

A third issue is whether or not the charges herein are barred by Section 10(b) of the Act.

1. Change of working conditions (shift hours)

The fact of change on May 3 of unit employees' shift hours is not in dispute. Respondent's principal defense on this issue is that the parties were at an impasse in their negotiations, and that institution of its final offer was justified.

The parties have been without a contract since May 31, 1978, and held their last negotiation session on January 11, 1980. During that period of time they have held 25 or 30 negotiating sessions,[6] and have met on more than one occasion with a Federal mediator, the last such meeting with the mediator having been held November 15, 1979. At that time, according to the testimony of Norman Taylor, who is a member of the Union and one of the principal union negotiators in this matter:

> He said when we were separated, not together, that he could see the problems of both parties. He knew what the company wanted and he knew what the Union wanted. He understood that the Union had changed its position in all kinds of ways on job security and jurisdiction. But the company insisted on sticking to their proposal and would not change. The Union was always very flexible on this and he recognized that fact. He did state to us that he could see that it was no good of him sitting in the way that we were going. He was mediating trying to help, but he could not help.

In November 1979 the Union organized a boycott against Respondent, circulated boycott handbills, and used radio broadcasts to advertise the boycott. Taylor appeared in his testimony to agree that the parties were at impasse:

> Q. Mr. Taylor, there has been some testimony here by Mr. Vickery, that negotiations had been at an impasse for a long time, and there has been no movement made. Could you tell me briefly, what the main areas of contention have been during the course of these negotiations?
>
> A. The main area is jurisdiction, job security. If we were going to give the company certain jurisdiction in return we needed job security for the people who were working there. And, this has been the main drawback. Also, the number of the employees that the company would guarantee a job to.

Charles Vickery, Respondent's attorney and principal negotiator, testified that section 23 of the 1975–78 bargaining agreement, which he termed to as a "featherbedding," or "bogus," provision, long has been objected to by Respondent, and that its deletion is insisted upon by Respondent, whereas the Union insists upon trading that deletion for concessions Respondent is not willing to make, including retroactive pay. Vickery stated that section 23 has been a principal factor, with some others, that created the impasse. Sherri Moore, one of Respondent's employees and the Union's steward in the unit, testified relative to section 23 that the provision has not been used in the past 5 years. However, she further testified:

> Q. Ms. Moore, if bogus hasn't been used in the five years you have been there, why has your Union Committee refused to delete it from the contract?
>
> A. It's part of the contract. It hasn't come up that I know of, in the time that I have been negotiating as far as working it—using it.
>
> Q. It is in every one of the company proposals to delete it, is it not?
>
> A. Uh-huh.
>
> JUDGE STEVENS: Is your answer, yes?
>
> THE WITNESS: Yes.
>
> Q. (By Mr. Vickery) Why haven't you agreed to delete it?
>
> A. I am not really sure exactly why. I am part of the bargaining group.

[5] Shift rates are set forth in sec. 10 of the expired bargaining agreement.

[6] Dates of only a few of the sessions, discussed *infra*, were established at the hearing.

Taylor acknowledged that the Union has refused to delete section 23 except in exchange for concessions by Respondent:

> Q. Why do you refuse to delete the bogus clause?
>
> A. We haven't refused to delete it. I have had experience where I work now. I have got job security for life. This was traded to the publishers and every employee got job security from it. So, I feel that the bogus is in there, and you say you want it deleted. And, I feel that we should trade it for something. Over the table, at times, I think once you said, the people could get 40 hours and a wage increase and give up reproduction. I said give us retroactive for it.
>
> * * * * *
>
> Q. Is the reason you won't agree to delete bogus, because you want to sell it or trade it for something else?
>
> A. We feel it is a bargaining position that we can use to trade for something else. We do. Yes.

Vickery testified as follows:

> There hasn't been any movement of any substance by the Union since June 1978. In fact, the Labor Board found—the Regional Director here found an impasse as of June 15, 1978, and the Union has made no significant concession since before June 15th, when we made a unilateral change in the contract and the Board said it was justified. If I remember correctly, that was because an impasse had been reached, and they refused to prosecute the charge. That is why we want the Board to produce the charges and the General Counsel determinations.

Vickery's testimony was not challenged by the General Counsel, and the matter was not pursued or explained.

Although the parties have met and negotiated many times, events that occurred at those meetings were not explored at hearing, other than in general terms and in a tangential manner. Results of negotiations relative to section 12 were testified in some detail, however, as discussed *infra*. In any event, it is clear that the parties have negotiated rather exhaustively, and that there have been some concessions on both sides. Witnesses for both sides testified that the opposing side did not exhibit complete good faith in bargaining, but the General Counsel does not allege, nor does the record show, that Respondent engaged in bad-faith bargaining. The number of negotiation sessions held by the parties prior to May 3 is not controlling but, generally, the more meetings there are, the more likely is the possibility of finding an impasse.[7]

It seems likely, in view of the foregoing, that the parties were at impasse as of the date of hearing, but that is not the controlling date. For an impasse to constitute a defense to the charges, it would have to be established as of May 3, when the shift change was effected. It is Respondent's burden to show an impasse as of that date, and that burden was not met. The history of bargaining relative to section 12 is as follows:

On April 11, 1978, the Union and Respondent held their first bargaining session. Taylor distributed the Union's original contract proposals, which included a provision for section 12 "Day-Night-Lobster Shifts." The Union's proposal on section 12 was that the language remain the same as it was in the contract then in effect.

On April 26, 1978, representatives of the Union and Respondent again met to bargain and Vickery distributed Respondent's original contract proposals. Respondent's proposal number 29 provided that section 12 of the previous contract be amended to read as follows:

> DAY—NIGHT—SHIFT
>
> Section 12: Hours worked beginning and ending between the hours of 7 a.m. and 6 p.m. shall be paid the day rate. Hours worked beginning or ending between 6 p.m. and 7 a.m. shall be paid the night rate. The rate of pay will be determined solely by the time the hours are actually worked. Such rate will not be determined on a daily basis.

Respondent's proposal would discontinue the "lobster" shift, and make the shift differential payable only for hours actually worked. There was no discussion of section 12 at this meeting.

At the negotiating sessions held on June 7 and 14, 1978, Respondent presented the Union with "package" contract proposals, each of which proposed that section 12 be amended to accord with Respondent's April 26, 1978, proposal.

There was no further discussion of section 12, nor were any other proposals made relative to that section, until the negotiating session of November 15, 1979, when Respondent proposed that section 12 be deleted in its entirety. Union Representative Frank Karl asked Vickery why Respondent proposed to delete section 12, and Vickery replied that there would be no night rate. Karl then stated that the Union's proposal would be that section 12 remain the same as it was in the previous contract.

The next negotiating session was held on November 19, 1979, during which the Union made a counterproposal to Respondent's November 15 proposal relative to Section 12. The Union's counterproposal deleted the "lobster" shift and left the night rate open to later negotiation. Vickery rejected the counterproposal, stating there would be no night rate. Respondent offered no other proposal at this session relative to section 12, and there was no further discussion of the section at this session.

Taylor credibly testified that, at the next negotiating session held on November 20, 1979, he orally altered his November 19, 1979, proposal to read "night shift" rather than "night rate." According to Taylor, Vickery again rejected the proposal, stating there would be no night rate.

The parties last met on January 11, 1980, during which session the only business relative to section 12 was a dis-

[7] *Fetzer Television, Inc.* v. *N.L.R.B.*, 317 F.2d 420 (6th Cir. 1963).

cussion concerning Respondent's unilateral institution of a change in shift hours.

As shown above, there was no bargaining concerning section 12 between the date of Respondent's submission of its proposal on April 26, 1978 (as affirmed by a "package" proposal on June 7 and 14, 1978), and May 3, 1979. Thus, Respondent did not establish an impasse on section 12, as of May 3. As discussed *supra*, Respondent did not show an impasse in bargaining for a contract as of May 3, even though an impasse may have existed at some date thereafter. By changing shift hours on May 3, without bargaining with the representative of its employees, Respondent violated Section 8(a)(5) and (1) of the Act.[8]

The General Counsel argues that, even though the parties may not have been at impasse on May 3, the shift hours placed in effect by Respondent were different from Respondent's last offer, hence the change cannot be justified as a response to the impasse. As shown above, the shift change of May 3 was not the same as Respondent's last offer prior to that date. The question is whether or not the change was "consistent" with the last offer. The General Counsel cites *SAC Construction Company*,[9] and *Allen W. Bird II*,[10] as authority for the argument that Respondent's last offer was not consistent with the change it made. However, those cases are inapposite since, in both of them, Respondent had made no proposals concerning the matters which were the subjects of unilateral changes, and the matters never had been bargained. Board law does not require that any change in the face of an impasse must be exactly the same as a prior proposal, nor does Board law require that the change must have been the subject of a specific proposal. What is required is that the change must have been reasonably comprehended by proposals previously offered.[11]

The reason for Respondent's original proposal was not the same as that of the change of May 3. The original proposal was directed to elimination of the lobster shift, and anticipated normal bargaining concerning shift work. The change of May 3 was a response to an emergency situation. As argued by Respondent, that emergency was real, and was serious. The reason for changing the shift well may have been a good one. However, the change was instituted because of the emergency, and with the goal of responding to that emergency without increasing costs by paying more than day-shift rates. The fact that an emergency existed is not necessarily a proper basis for unilateral institution of change during negotiations. It is found that the shift change was not reasonably comprehended by Respondent's proposal of April 26, 1978.

[8] Respondent's argument that it was unable to get in touch with union representatives because Frank Karl, the International representative, was not in town, and the situation was an emergency, is found to be without merit.

[9] *SAC Construction Company, Inc.*, 235 NLRB 1211 (1978).

[10] *Allen W. Bird II, Receiver for Caravelle Boat Company, a Corporation, and Caravelle Boat Company*, 227 NLRB 1355 (1977).

[11] *O'Malley Lumber Company*, 234 NLRB 1171, 1178; *Taylor-Winfield Corporation*, 225 NLRB 457, 462 (1976); *Taft Broadcasting Co., WDAF AM-FM TV*, 163 NLRB 475, 478 (1967).

2. Appropriate unit and representative status of the Union

Respondent's denial of the unit and the Union's status has no support in the record. Further, Respondent's counsel does not argue this issue in his brief and, to the contrary, argues from facts that support the General Counsel's allegations in the complaint relative to these matters.

Taylor has participated in all negotiations between Respondent and the Union, for an agreement to succeed the contract which expired May 31, 1978. Taylor credibly testified concerning facts outlined in the background section, above, that the parties have had successive agreements approximately 35 years, that the most recent agreement expired May 31, 1978, and that the parties have been negotiating to the present, for a successor agreement. So far as the record shows, there has been no change in the unit over the past 35 years. Therefore, the presumption is that the Union was, during the term of the expired contract, and now is, the representative of employees in the unit described above.[12] Respondent offered no testimony or evidence to rebut that presumption. The allegations of the complaint concerning this issue are supported by the record.

3. The 10(b) issue

The pertinent portion of Section 10(b) of the Act is as follows:

> *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.

The shift change was made on May 3, 1979, and employees were not finally restored to the day-shift hours until December 14, 1979. The charge was filed January 22, 1980. Therefore, the 10(b) period is applicable prior to July 22, 1979.

The first question is whether or not the 10(b) period applies as of May 3, 1979, or whether the violation is of a "continuing" nature.

The Board long has drawn a distinction between those complaints based on charges that an unfair labor practice has occurred outside the 10(b) period, and those based on actions which, although arising outside the 10(b) period, nevertheless give rise to independent violations within the 10(b) period. For example, promulgation of an overly broad, invalid no-solicitation rule outside the 10(b) period is not actionable, yet maintenance and enforcement of that rule within the 10(b) period is actionable.[13] The same approach has been followed in the case

[12] *Barrington Plaza and Tragniew, Inc.*, 185 NLRB 962 (1970), and cases cited therein.

[13] *Varo, Inc.*, 172 NLRB 2062 (1968).

of a rule proscribing distribution of literature by off-duty employees in nonworking areas during nonworking time.[14] Similarly, cases consistently hold that Section 10(b) does not bar legal action when an employer repeatedly refused to bargain, and a complaint is filed within 6 months of one such refusal, even though the initial refusal was outside the 10(b) period.[15] In these lines of cases, and others of similar nature, the actions complained of under the Act constitute, as a substantive matter, unfair labor practices. They can stand alone. Events outside the 10(b) period are admissible to shed light on those practices, but that evidence does not change the nature of the practices themselves.

The foregoing lines of cases are distinguishable from cases wherein conduct occurring within the 10(b) period can be considered unfair labor practices only through reliance on an earlier unfair labor practice outside the 10(b) period. The latter cases are epitomized by *Bowen Products Corporation*,[16] and *Greenville Cotton Oil Company*[17] In Bowen, an employee was included in a layoff within the limitation period, as a result of his seniority status discriminatorily established outside the limitation period. The Board dismissed the complaint on the basis that the only support for holding the layoff to be unlawful would be a determination that the discriminatory establishment of seniority status was unlawful. The limitation of the statute precluded such a holding. In *Greenville*, strikers who had been permanently replaced demanded reinstatement on the ground that the strike had been caused or prolonged by unfair labor practices committed by the employer prior to the hiring of replacements. The alleged unfair labor practices were outside the 10(b) period, and the Board refused to order reinstatement.

The question here, then, is whether Respondent's actions within the 10(b) period are independent, substantive unfair labor practices, or whether those actions could be unfair labor practices only if they are grounded on unfair labor practices outside the 10(b) period. The fact that Respondent initially committed an unfair labor practice on May 3, by changing shift hours, is found above. No timely charge was filed on the basis of that unfair labor practice. Thereafter, on June 30, two employees were returned to the 7 a.m. to 3 p.m. shift and, on September 15 or 18, two more employees were returned to that shift. The remaining four employees were returned to the 7 a.m. to 3 p.m. shift on December 14. Changing shift hours of employees is not, in and of itself, an unfair labor practice. The General Counsel does not contend, and the record does not show, that the changes were made for an improper reason. The record establishes that the shift change made on May 3 was dictated solely by emergency business requirements. The reason, or reasons, for Respondent later returning employees to their original shifts was not established at hearing, but there is no indication that the changes were discriminatory, or constituted unfair labor practices.

The question then becomes, whether or not the Union revived the otherwise time-barred violation, by requesting of Respondent that it bargain about the change, on a date, or dates, within the 10(b) period. Paragraph 15 of the complaint alleges, and it is found, that Respondent changed employees' starting times without notice to the Union, and paragraph 17 alleges, and it is found, that Respondent changed the shift rate of pay for such employees without notice to the Union.

The General Counsel contends that Respondent concealed its activity by misleading Taylor and Frank Karl, a representative of International Typographical Union who participated in the negotiations referred to herein.

Taylor testified that, on May 17, he wrote a letter to Vickery reading as follows:

> It is our understanding that the Baytown Sun's plant was severely damaged as a result of fire earlier this month. We further understand that publication has been discontinued at the Baytown location, and that a number of the employees are being required to perform their work in Galveston at the Galveston Daily News.
>
> We realize such an event must necessarily result in a substantial disruption in normal operations and hereby offer to cooperate in any way possible.
>
> So that we may have a better understanding of what has taken place to date, and what the company's future intentions are with respect to its employees, we hereby request a meeting at the earliest opportunity.
>
> Mr. Karl and our committee will be available to meet on any date that is convenient for the company upon reasonable notice.

Taylor further testified that he never received a response to the letter, and that he first knew employees' shift hours had been changed when Karl was so informed by Moore during a union caucus at a negotiating session on December 11. Moore has been employed by Respondent approximately 13 years, is one of the unit employees whose hours were changed, is a member of the Union, is a member of the Union's negotiating committee, has attended all negotiation sessions between Respondent and the Union, is the chapel chairman and has occupied that position approximately 3 or 4 years, keeps timesheets of employees, files grievances for employees, and receives complaints from employees. It is clear, and found, that Moore is a union steward, and an agent of the Union in that capacity. Taylor testified that, when the union negotiators returned to the general meeting following the union caucus, Karl asked Fred Hornberger, one of Respondent's negotiators, "Do you realize that people are starting at 6:00 a.m. . . ?" to which Hornberger replied, "No." Taylor said Karl then asked, "Do you know that these people should be getting paid a night rate," to which Vickery replied that no one was going to get a night rate because they did not have a night shift. Taylor said that, after he, Karl, and Joseph Pineda, the Union's

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[14] *Cone Mills Corporation White Oak Plant*, 174 NLRB 1015 (1969).

[15] *J. Ray McDermott & Co., Inc.* v. *N.L.R.B.*, 571 F.2d 850, 858, (5th Cir. 1978).

[16] 113 NLRB 731 (1955).

[17] 92 NLRB 1033 (1951), affd. *sub nom. American Federation of Grain Millers, A. F. of L.* v. *N.L.R.B.*, 197 F.2d 451 (5th Cir. 1952). See also *Local Lodge No. 1424, International Association of Machinists, AFL-CIO, et al. [Bryan Manufacturing Co.]* v. *N.L.R.B.*, 362 U.S. 411 (1960).

president, returned to their office, they drafted a letter reading as follows:

December 11, 1979

Mr. Leon Brown
c/o Baytown Sun
P.O. Box 90
Baytown, Texas 77520

Dear Mr. Brown:

It has come to the Union's attention of the Representative Karl on December 11, 1979, that when he was going to make a counter proposal on Section 12, relating to Day and Night Scale that the Company had not been paying the night scale when it changed employees starting times from 7:00 a.m. and 8:00 a.m. to 6:00 a.m.

The Union is requesting the Company to pay the employees the differential between the night and day scale which they should have received. This also relates to overtime.

The Union assumes this had been an oversight on your part and not a unilateral change and hopes this adjustment will be made as soon as possible.

Very truly yours,
/s/Joseph Pineda
Joseph Pineda, President
HOUSTON TYPOGRAHICAL UNION #87

JP:nmg
OPEIU #129
AFL-CIO

CC: Charles R. Vickery, Jr.

P.S. Please respond to this request in writing at your earliest convenience at the above address.

Taylor testified that the Union has received no reply to the letter, and that, during the negotiation session of January 11:

> We met and then Mr. Karl said that we hadn't had a response from our letter and Mr. Vickery replied that we didn't deserve a response because he was not paying overtime. Mr. Karl said that we are not discussing overtime, we were discussing the night rate.
>
> Q. And what, if anything, was said then?
>
> A. And then Mr. Karl said that our people should be getting 85 cents an hour more. And Mr. Karl said that if our people did not get it, we would have to go to the Board to get our money.
>
> Mr. Vickery said that we did not deserve the money, we would not get the money, and if we did pursue it to litigation that any money that we might receive would be deducted from the outstanding wage proposal from the company. He said, "If you crook us that way we are going to have to fight."

Karl generally corroborated Taylor, and further testified that, during a meeting of the negotiators with a Federal mediator in July 1979:

> At that time I asked him about the fire. And, I said, "What effect did it have on the Bargaining Unit?"
>
> Mr. Hornberger said that it had no effect.
>
> I said, "Well, what about any effect on working conditions of the Bargaining Unit?"
>
> He said there was no effect or change. He said that they were printing their paper in Galveston and setting up—composing it there, and I guess, later on they went over to Baytown in some warehouse and printed it.

Taylor corroborated Karl's testimony on this point.

Moore corroborated Taylor and Karl.

The law is well settled that the 6-month limitation period prescribed by Section 10(b) of the Act does not begin to run on an alleged unfair labor practice until the person adversely affected is put on notice, actually or constructively.[18] One question here is Moore's status. As described above, Moore is closely tied to the Union, in addition to being one of Respondent's unit employees. Moore was fully advised of Respondent's actions following the fire, since she was a participant in those actions. Moore worked closely with the Union, and attended all the approximately 25 or 30 negotiation sessions. She was more than a union steward, and her knowledge of Respondent's actions relating to the shift changes was the Union's knowledge.[19] If she did not advise the Union of what was happening, that fact would be surprising, but it is irrelevant herein. What is relevant is the fact that she was fully aware of what Respondent was doing.

So far as alleged concealment is concerned, the record shows that it did not exist. Moore knew about all shift changes, when they occurred, as did all unit employees. The shift change of May 3 was not put on the bulletin board in advance, as had been done in the past, because the bulletin board at Baytown had been destroyed by fire.

A further question is whether there was an oral request to bargain during a July session described by Karl in the colloquy quoted above. Vickery, Moore, and Taylor attended that meeting, and corroborated Karl. The questioning by Karl did not constitute a request to bargain about the shift changes. Karl's questions were ambiguous, they were not directed toward bargaining, and they were made in the presence of Moore, who was knowledgeable about the shift changes, but who did not, according to the record, make any comment about the changes when Karl asked about them. In any event, the General Counsel did not establish the date of the alleged conversation, and a finding cannot be made that that

[18] *Wisconsin River Valley District Council of the United Brotherhood of Carpenters and Painters of America AFL-CIO (Skippy Enterprises, Inc.)*, 211 NLRB 222 (1974); *Alabaster Lime Company, Inc.*, 194 NLRB 1116 (1972); *L. C. Cassidy & Son, Inc.*, 185 NLRB 920 (1970).

[19] *International Association of Bridge, Structural and Ornamental Ironworkers, Local No. 423, AFL-CIO (Robert E. McKee, Inc.)*, 233 NLRB 283 (1977); *United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union No. 83, AFL-CIO (Power City Plumbing & Heating, Inc.)*, 238 NLRB 499 (1978); *International Brotherhood of Teamsters, General Drivers, Chauffeurs and Helpers Local Union No. 886 (Lee Way Motor Freight, Inc.)*, 229 NLRB 832 (1977).

date was not within the 10(b) period, which covered all events prior to July 22.

It is clear that Pineda's letter dated December 11, 1979, addressed to Leon Brown of Respondent, described above, constituted a request to bargain. From and after receipt of that letter, Respondent was obligated to bargain with the Union concerning the shift change, and refusal to do so was a violation of Section 8(a)(5) and (1) of the Act, as alleged in the complaint. As stated in *J. Ray McDermott & Co., Inc.* v. *N.L.R.B.*, 571 F.2d 850, 858:

> This circuit has twice held that each refusal to bargain by an employer under a duty to bargain is a violation of the employer's duty, and that the passage of more than six months' time from one such refusal does not bar action by the NLRB on a timely complaint based on a subsequent refusal. *N.L.R.B.* v. *Louisiana Bunkers, Inc.*, 5 Cir. 1969, 409 F.2d 1295, 1299-1300; *N.L.R.B.* v. *White Construction & Engineering Co.*, 5 Cir. 1953, 204 F.2d 950, 952-953. Our reasoning is not controlled by a conclusory labeling of the employer's duty or of his violation as a "continuing" one. Rather, we recognize that the primary purpose of the six-month rule is to assure prompt adjudications of disputes based on fresh evidence. McDermott's refusal to bargain was based on motives contemporaneous with its refusal to bargain on April 21, 1976. The filing of a complaint on April 29, 1976 brought those motives into question, and was timely with regard to the unfair labor charge alleged. Cf., *Local Lodge 1424* v. *NLRB*, 1960, 362 U.S. 411, 416–422, 80 S. Ct. 822, 4 L.ED . . .; *N.L.R.B.* v. *McCready and Sons, Inc.*, 6 Cir. 1973, 482 F.2d 872.

The final question on this issue is the Union's letter of May 17, 1979, to Vickery, quoted *supra*. The 10(b) period is applicable any time prior to July 22, 1979, which is 6 months prior to the filing of the charge on January 22, 1980. Thus, the letter of May 17 did not constitute a timely request to bargain, regardless of its content.

4. Alleged 8(a)(1) statement

Paragraph 18 of the complaint alleges that, on or about January 11, 1980, Vickery told employees that, if they filed any charges with the Board or in the courts and recovered any backpay award, that award would be subtracted from Respondent's outstanding wage proposal.

The fact, and date, of Vickery's statement, or that he made a similar statement of the same import, credibly was testified to by Taylor, Karl, and Moore, and was not denied by Vickery.

Only Moore of the three who were present was an employee, at the time the statement was made, and Moore was not present as an employee—she was present as a union representative. However, the General Counsel does not ground the argument in the brief upon coercion of an employee, even though the complaint is couched in such language. Argument in the brief addresses the concept that Vickery's remarks "inhibit free access or resort to the Board's processes." Thus, *Houston Chronicle Publishing Company*,[20] cited by the General Counsel, is applicable.

It may be argued that *Houston Chronicle* is distinguishable, since there the threat was to file an action against the union in damages if National Labor Relations Board charges were filed by the union instead of going to arbitration under the bargaining agreement. Similarly, *Clyde Taylor*,[21] relied on by the administrative law judge in *Houston Chronicle*, involved a threat to file a libel suit if a union charge with the Board was not dropped. However, that is a distinction without a legal difference. Here, the threat was to lower a contract offer if a charge with the Board was pursued by the Union. The effect of the threat, as in *Houston Chronicle* and *Clyde Taylor*, was to put pressure on the union because of the union's resort to the Board's processes. The Board's processes, as well as employees' rights, were impinged upon. Thus, the threat was coercive, and in violation of Section 8(a)(1) of the Act.[22]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in, and is engaging in, unfair labor practices in violation of Section 8(a)(1 and (5) of the Act, it will be recommended that Respondent be ordered to cease and desist therefrom, and to take certain affirmative action designed and found necessary to effectuate the policies of the Act.

It has been found that employees' shift hours were changed on May 3, 1979, that the Union requested on December 11, 1979, that Respondent bargain concerning any changes in employees' working conditions resulting from a fire that virtually destroyed Respondent's plant on May 2, and that Respondent refused to bargain as the Union requested. I shall, therefore, recommend that Respondent cease and desist from refusing to bargain with the Union concerning any change of employees' working conditions, and that Respondent make whole all employees whose shift hours were illegally changed by Respondent, effective from and after December 13, 1979,[23] with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[24]

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[20] 227 NLRB 1829 (1977).

[21] *Clyde Taylor, d/b/a Clyde Taylor Company*, 127 NLRB 103 (1960).

[22] See also *West Point Pepperell, Inc.*, 200 NLRB 1031 (1972).

[23] Two days are allowed for intracity mail.

[24] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the basis of the foregoing findings of fact, and upon the entire record, I hereby make the following:

CONCLUSIONS OF LAW

1. Southern Newspapers, Inc., d/b/a The Baytown Sun, is, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Houston Typographical Union No. 87, affiliated with International Typographical Union, AFL-CIO, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees of Respondent at its Baytown, Texas facility, who are engaged in the printing process from the markup or preparation of copy, until the material is ready for the camera room, excluding all other employees.

4. The Union is, and at all times material herein has been, the exclusive bargaining representative of all employees in the appropriate unit described above.

5. Respondent violated Section 8(a)(1) of the Act by threatening an employee and the Union that, if they filed charges with National Labor Relations Board or any court, and received any award, the amount thereof would be deducted from any outstanding wage proposal from Respondent.

6. Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union concerning the change of shift hours of employees.

7. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[25]

The Respondent, Southern Newspapers, Inc., d/b/a The Baytown Sun, Baytown, Texas, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Violating Section 8(a)(1) of the Act by threatening an employee and the Union that, if they filed charges with National Labor Relations Board or any court, and received any award, the amount thereof would be deducted from any outstanding wage proposal from Respondent.

(b) Violating Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union concerning the change of shift hours of employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action, which is deemed necessary to effectuate the policies of the Act:

(a) Upon request, bargain with the Union as the exclusive representative of all employees in the appropriate unit described above, relative to shift changes of employees.

(b) Make whole all employees whose shift hours were changed on and after May 3, 1979, by paying said employees in accordance with rates established by the Union and Respondent for hours worked by those employees on and after December 13, 1979, with interest.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Post at its Baytown, Texas, facility copies of the attached notice marked "Appendix."[26] Copies of said notice, on forms provided by the Regional Director for Region 23, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 23, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[25] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[26] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."